United States Bankruptcy Court
Central District of California
Santa Ana
Judge Theodor Albert, Presiding
Courtroom 5B Calendar

Wednesday, October 12, 2016 **Hearing Room 5B**

10:00 AM

8:09-17098 Lorraine M. Nichols **Chapter 11**

#1.00 United States Trustee's Motion to Dismiss or Convert Reorganized Debtor's Case Under 11 U.S.C. Section 1112(b) and Local Bankruptcy Rule 3020-1 for Failure to File Post-Confirmation Status Reports.

Docket 147

***** VACATED *** REASON: OFF CALENDAR; VOLUNTARY DISMISSAL OF U.S. TRUSTEE'S MOTION TO DISMISS OR CONVERT DEBTOR'S CASE UNDER 11 U.S.C. SECTION 1112(b) FILED 9/19/16**

Tentative Ruling:

- NONE LISTED -

Party Information

Debtor(s):

Lorraine M. Nichols — Represented By Illyssa I Fogel

10:00 AM
8:15-14629 Shahid Chaudhry **Chapter 11**

#2.00 STATUS CONFERENCE Re: Confirmation of Chapter 11 Plan Of Reorganization
(cont'd from 8-24-16)

Docket 57

Tentative Ruling:

Tentative for 10/12/16:
See #3.

Tentative for 8/24/16:
Will a revised disclosure also be necessary in view of the first amended plan?

Tentative for 4/27/16:
Given that no new objections have been filed, the court views disclosure as adequate.

Tentative for 2/24/16:
Debtor has used the form for individual debtor disclosure statement and plan. Debtor proposes to cure the arrears on the principal residence over 10 years with no interest. This is not acceptable. Debtor must provide interest so that the creditor receives the current value of its claim. [Plan, p. 3] Debtor also should include any arrears that exist for the Class 3 claims. [Plan, p. 4] The Class 3(b) creditor has objected because the amount of its arrears are incorrect. Based on the UST's comments, there should be arrears for the Class 3(a) claim as well. These arrears

10:00 AM

CONT... Shahid Chaudhry **Chapter 11**

must be paid with interest. Debtor should address the feasibility concerns raised by UST and perhaps provide more detailed projections for the life of the plan. If Debtor is not going to be able to sustain his mortgage payments then there may not be a reason to pursue this plan. If there is going to be a valuation under section 506, the plan and DS need to discuss it.

The plan should include language addressing the revesting of property in the estate upon conversion of the case.

Party Information

Debtor(s):

Shahid Chaudhry — Represented By
Anerio V Altman

10:00 AM
8:15-14629 Shahid Chaudhry **Chapter 11**

#3.00 Motion For Approval Of Chapter 11 First Amended Disclosure Statement

Docket 133

Tentative Ruling:

This is debtor's motion to approve as adequate his First Amended Disclosure Statement ("FAD"). The FAD has drawn only one opposition, the State Employment Development Department ("EDD"). The opposition is concerned with confusion arising under the FAD over the placement of EDD into Classes 2-5 (or is it 4?) (secured claims) or 5 (general unsecured). The court agrees that the discussion could be a lot clearer. Apparently, debtor intends to value certain real property in such a way that the EDD's recorded junior lien will be determined valueless by motion under §506, thus relegating EDD into the unsecured class. That should be expressed more definitely; also, it should be made clear that the FAD, even if approved, is not a substitute for a separate and formal motion under §506 or possibly §522(f). Other concerns noted by the court are:

> Liquidation analysis is not in tabular form. Additionally, there is no side by side comparison between the plan and Chapter 7 liquidation
>
> Feasibility is in the form of a narrative. While there is an attached exhibit with projected monthly expenses (see Declaration of Current/Post petition Income and Expenses), there appear to be no projections regarding expenses over the life of the plan. Further, little or no attention is given to rental income, and if it is so insignificant, some discussion should be given as to why the debtor is keeping these properties, particularly if they are not cash positive.
>
> Only oblique mention is made of EDD's claim in the FAD. As discussed above, the characterization as secured (Class 2) or wholly unsecured (Class 5) should be clarified. Indeed, separate treatment for each secured claim is

10:00 AM
CONT... Shahid Chaudhry **Chapter 11**

in order.

Debtor generally does not discuss interest rates for secured claims (classes 2-5) should any class member reject the plan. The only mention of an interest rate appears at page 7 of the Plan (attached as an exhibit to the FAD) of 1.515% per annum. Where this number comes from is not explained but it is woefully inadequate in the event of a rejection of the plan by the affected creditor. Similarly, on the same page at line 21-24 no interest on the HOA lien is promised at all. This is not confirmable unless the affected creditor consents.

The secured classes (are they 2-4, or 2-5, the FAD is inconsistent?) should be specifically identified as one class per creditor, if that is the intent. If more than one creditor is in a class, that should be clarified and they should be so identified.

The Plan provides for a discharge upon substantial consummation of the plan at p. 14, line 11. This is not the law, as properly noted at p. 6, line 21 of the FAD. But the contradiction should be explained or corrected as appropriate.

The FAD is unclear as to the length of the term of this proposed plan. It would seem to be 60 months but that is left largely to surmise, particularly as concerns treatment of lien holders. This becomes important at page5 lines 4-11 where the debtor is only promising installments over 5 years. If the actual term of treatment of *any* creditor unde the plan is longer than five years, then in the event of objection so must be the term of dedication of disposable income. §1129(a)(15)(B).

While this is a confirmation issue, not a disclosure question, no discussion about application of the absolute priority rule appears. See *In re Kamell*, 451 B.R. 505 (Bankr. C.D. Cal. 2011); *In re Zachary*, 811 F. 3d 1191 (9th Cir. 2016). If there will be contribution of new value in the event of cram

10:00 AM

CONT... Shahid Chaudhry **Chapter 11**

down, it might serve to discuss whether such value has been identified and/or will be attempted.

Deny as written but continue for corrections and amendment

Party Information

Debtor(s):

Shahid Chaudhry — Represented By Anerio V Altman

10:00 AM

8:15-15824 Michael Frederic Gellerman and Denise Walz Gellerman **Chapter 11**

#4.00 Motion For Order Approving Disclosure Statement As Containing Adequate Information Pursuant To Bankruptcy Code §1125(A)(1)(B)
(cont'd from 9-14-16)

Docket 65

Tentative Ruling:

Tentative for 10/12/16:

Nothing further filed? Status?

Tentative for 9/14/16:

This is obviously a very challenged case. It should go without saying that the Disclosure Statement should be consistent with the stipulation between debtor and Consumer Portfolio, or if something else is proposed, just how that is even possible under these circumstances. Apparently, given the narrative appearing in the IRS opposition, the debtors are distressingly indifferent to paying taxes when they are due. Insofar as there is an administrative portion due (anything accruing post-petition) it *must* be paid in full in cash on the effective date absent IRS acquiescence to other treatment. 11 U.S.C. §1129(a)(9)(A). Neither side has stated what such a portion might be, but this is not something that can be evaded and there is little or no indication in this draft that this issue has even been considered. The balance of the claim is also problematic. As the court reads it, the IRS unsecured §507(a)(8) claim must be paid *in full* within five years of the petition date in "regular installments."§ 1129(a)(9)(C). Moreover, the total value of the payments must be of a present value equal to the claim. This present value requirement would also apply to the secured portions, although it is left unclear exactly what portions are in fact secured. This means that a risk analysis of cram down interest must be made, and to the extent the risk imposed by the plan is higher then so must be the interest paid be higher in order

10:00 AM

CONT... Michael Frederic Gellerman and Denise Walz Gellerman **Chapter 11**

to achieve "present value." See e.g. *In re North Valley Mall, LLC*, 432 B.R. 825 (Bank. C.D. Cal. 2010). It is manifestly insufficient to pick some vague and random rate out of thin air, such as 3% (or even 4%). Confirmable interest rate is a function of imposed risk and requires analysis. The court also doubts that interest only payments for the first 60 months as apparently is proposed at p. 18 of the DS will accomplish the statutory requirements of being "regular" or will pay the claim in full within 5 years. It certainly will drive up risk and hence amount of interest. How exactly the action filed 8/1 to determine the amount of the secured claim filed by debtor fits into the plan treatment should be better explained as well.

Because so much is left unclear the court cannot tell at this juncture whether the plan is totally unconfirmable, but at the very least clarity on the above must be given before the court can allow this to go out for creditor vote.

Deny

Party Information

Debtor(s):

Michael Frederic Gellerman — Represented By
Michael Jones
Sara Tidd

Joint Debtor(s):

Denise Walz Gellerman — Represented By
Michael Jones
Sara Tidd

10:00 AM
8:15-15931 John J Trejo and Elsie Alfeche Baclayon **Chapter 11**

#5.00 Motion For Approval Of Chapter 11 Disclosure Statement
(cont'd from 8-24-16)

Docket 46

Tentative Ruling:

Tentative for 10/12/16:

Nothing new has been filed. Status?

Tentative for 8/24/16:

This is the continued hearing on adequacy of Debtor's Disclosure Statement from June 8.

An Amended Disclosure Statement ("ADS") and Plan were filed on July 29, 2016. Some issues identified by the court last time have been addressed, but very significant issues still remain.

· At p. 8, Debtors state that the anti-modification provisions of section 1123(b)(5) do not apply to the Pacific Hills property because the loan is not secured solely by the principal residence, but also by "additional property" including appliances and other property located at the address. Debtors refer to the loan documents to support this assertion but unless the subject agreements are very different from the norm, this works against them. The creditors' claims are not secured by additional property within the meaning of §1123(b)(5). Most courts have held that incidental collateral such as rents, insurance proceeds (or as in this case, fixtures such as appliances) which are inextricably bound to the real estate do not change the fundamental point of the statute or change the result, which is to prevent modification of mortgages on principal residences. See e.g. *In re Lievsay*, 199 B.R. 705, 708 (9th Cir. BAP 1996) citing *In re Davis*, 989 F. 2d 208, 212 (6th Cir.

10:00 AM

CONT... John J Trejo and Elsie Alfeche Baclayon **Chapter 11**

1993). Debtors are trying to read more into the security interest through boilerplate to escape the reach of §1123(b)(5) but this is unavailing; in standard mortgage cases (and there is no showing of anything otherwise here) it would defeat the very legislative purpose of the statute.

• At p. 18, the ADS still provides that the Class 1A and B claims are *not* secured by Debtors' principal residence because it is being converted to an investment property, i.e. future tense. But as noted in the previous tentative, the property was clearly Debtors' principal residence *on the petition date*, which is when the determination is made. See *In re Abdelgadir*, 455 B.R. 896, 898, 902-03 (9th Cir. BAP 2011); *In re Wages*, 508 B.R. 161, 164 (9th Cir. BAP 2014). Debtors still propose to modify this claim but this cannot be done absent consent.

• Debtors do not propose to pay interest on the Class 1D claim. How does that work consistent with "fair and equitable" as used in §1129(b)(2)(A)?

• The Class 2D and 2H claims now provide for interest at 5% from the petition date through the effective date of the plan. There is no provision for interest on Classes 2F, 2G, 2I, and 2J. This rate of promised interest has already drawn one objection and looks very problematic in cram down, particularly considering these are rental properties and the plan proposes a period of interest only, thus magnifying risk (and thus requiring even higher interest).

• The ADS creates two classes for disputed, contingent and unliquidated claims – one for filed claims and one for unfiled. This raises questions of impermissible gerrymandering.

• The son's expected contribution to the plan is explained at p. 38. He is studying to become a Registered Nurse and expects to earn (assuming he graduates at some future time and receives employment) a salary of approximately $60,000, of which he pledges to contribute $28,000 to the plan. Citation is made to statistics about the average compensation for registered nurses. But all of this is based on a huge dose of speculation akin to the proverbial "hail Mary" pass in a football game, and absent

10:00 AM

CONT... John J Trejo and Elsie Alfeche Baclayon **Chapter 11**

more will not pass opposition on feasibility grounds. The court hopes the son succeeds but it doubts that feasibility (which must focus on what exists, not what is hoped for) can be grounded on something so intangible.

• At p. 48, Debtors state that they will withdraw more than $15,000 from a 401K retirement account in order to make the new value contribution and pay taxes and penalties for early withdrawal. No suggestion is made as to how the market testing required under *Bank of America v. 203 N. LaSalle St. Ptsp*, 526 U.S. 434 (1999) will be met. While this is a confirmation issue, not necessarily a disclosure issue, cumulatively it exposes the profound weakness of this plan and causes the court grave concern as to whether the effort and cost to disseminate this disclosure is justified.

Absent a better explanation as to how these fundamental obstacles are to be overcome, the court cannot in good conscience let this progress to the next step in what is probably a futile effort at confirmation.

Deny

Prior Tentative:

This disclosure statement does not contain adequate information and thus cannot be approved. There are also significant problems with the plan as proposed. Some of those problems are summarized in the UST objection and should be addressed by Debtor, particularly as concerns the §1123(b)(5) prohibition against modification of loans secured by the principal residence as of the petition date, as is implied in the treatment of Classes 1A and 1B. See e.g. *In re Abdelgadir* , 455 B.R. 896 (9th Cir BAP 2011). If argument exists for why these loans are not secured only by the residence, and thus not subject to the prohibition, that should be explained here. The UST is correct that this court does not view some incidental provision such as insurance proceeds pledged as additional collateral sufficient to nullify the prohibition. Also problematic is the fact that creditors, who are over secured, such as

10:00 AM

CONT... John J Trejo and Elsie Alfeche Baclayon **Chapter 11**

those of Classes 2D-J, are entitled to interest, yet no reference is made to this. Moreover, there appears to be a discrepancy between what is reported as owed, the various arrearages accrued given and an apparent lack of recent post-petition payments. Feasibility may also be a large issue, although typically this is reserved for confirmation except in extreme cases. But this could be such a case. How the son is expected to make contributions without current income should, at the very least, be explained. Similarly, the source of $15,000 new value should be explained. The inconsistency between the treatment of unsecured creditors at p. 12, lines 9-10 and p. 32, lines 1-7 (5% vs 21% dividends, respectively) requires reconciliation, or at least explanation.

In addition, the court notes the following:

- A section 506 motion should be filed for the Goldfire Property. Valuations by appraisers, while useful, are only half the equation.

- There are two classes of general unsecured creditors – one is for disputed, contingent and unliquidated claims with filed claims. The total proposed payout for the two classes is the same. This could become an issue at confirmation absent some explanation for the separate classification other than as an attempt at gerrymandering.

- There is a discussion of the Absolute Priority Rule at p. 52-54. Debtors propose a new value contribution of $15,000 if necessary. This is clearly an issue that would come up at confirmation but in meantime some explanation ought to be given for the source of such funds. Reportedly, these are coming from a retirement vehicle of some kind, but the specific source and impact of tax and withdrawal penalties, if any, is not discussed

Deny

Party Information

Debtor(s):

John J Trejo — Represented By
Michael Jones

United States Bankruptcy Court
Central District of California
Santa Ana
Judge Theodor Albert, Presiding
Courtroom 5B Calendar

Wednesday, October 12, 2016 **Hearing Room 5B**

10:00 AM

CONT... John J Trejo and Elsie Alfeche Baclayon **Chapter 11**

Sara Tidd

Joint Debtor(s):

Elsie Alfeche Baclayon

Represented By
Michael Jones
Sara Tidd